next highest bidder." (Justice Schneider's concurring Opinion)[7]

Nothing in this action was violative of any of the provisions of Amendment XIV to the Constitution of the United States insofar as it affected the petitioners.

Statutory provisions involved under 3313.46 of the Ohio Revised Code set up the procedure requirements for bid letting by school boards in Ohio. While affected by the outcome of the cause, the requirements for financing such improvements, which are also statutory, were not ruled upon by the court and did not come into issue in this cause.

STATEMENT OF THE CASE

This case arose in the Common Pleas Court of Ross County, Ohio, on petition of the Board of Education of the Chillicothe City School District as plaintiff in a suit on a bid bond submitted by Sever-Williams Company, Inc., one of the defendants, (petitioners herein), on the bid for the construction of a new high school in Chillicothe, Ohio, which bond had been offered by the defendant, Federal Insurance Company, as surety, as the bid bond for Sever-Williams Company, Inc., in connection with said bid. Said bond was conditioned as follows:

> "WHEREAS, the Principal has submitted a bid, dated June 20th, 1961, for construction of a new High School, Chillicothe, Ohio.
>
> NOW THEREFORE, if the obligee shall accept the bid of the principal and the principal shall enter into a contract with the obligee in accordance with such bid and give bond with good and sufficient surety for the

[7] Opinion, Ohio Supreme Court, Appendix (III)
"Note: Justice Schneider queried Mr. Petro, Counsel for Sever-Williams Company, Inc., as to why the petitioners herein had not promptly sought relief in equity, since, by failing to do so, they knowingly placed the Board of Education in a position where it either had to reject all bids or leave the award to Sever-Williams Company, Inc. upon their bid, stand."

faithful performance of such contract, or in the event of the failure of the principal to enter into such contract and give such bond, if the principal shall pay to the obligee the difference, not to exceed the penalty hereof, between the amount specified in said bid and the amount for which the obligee may legally contract with another party to perform the work covered by said bid, if the latter amount be in excess of the former, then this obligation shall be null and void, otherwise to remain in full force and effect." (Bd. of Ed., Exh. 2, Record P. 62)

The project was in connection with a building program adopted by the Board of Education of the Chillicothe City School District in 1958 and supported by a bond issue approved by the electorate of said district in the total sum of $4,500,000.00. The high school, the subject of this bid, was the final project, and advertisement started for bids for the project in early May. Following advertisements under the requirements of the Code, and in response thereto, the defendant, Sever-Williams Company, Inc., submitted a bid on June 20th, 1961, at about 12:00 o'clock noon. The Board of Education met at 12:00 o'clock noon on June 20th, 1961, and at a public meeting, opened the bids submitted for the new high school. At the opening of the bids, the defendant contractor, Sever-Williams Company, Inc., was found to have submitted a bid of $1,242,000.00 plus alternates, and a bid bond in the amount of $137,000.00. Sever-Williams Company, Inc., had previously done work for the Board of Education of the Chillicothe City School District and was awarded the bid at the meeting that followed the bid opening. The meeting was then recessed at some time before 2:00 o'clock P.M.[8] After a meeting on the evening of the following day, June 21st, 1961, at which the Board of Education received a telegram from Sever-Williams Company, Inc., the Board of Education carefully checked

[8] Record, P. 34

the bid, the bid bond, and found no mistakes or omissions. The bid was broken down into labor and materials and was within the architect's estimate for the construction of the new high school. After waiting five (5) days and after receiving a corporate resolution on June 27th, 1961, from the Sever-Williams Company, Inc. which declared its intention not to honor its bid which resolution was presented by a Vice-President of Sever-Williams Company, Inc.[9] the Board of Education let the contract to Knowlton, Inc., to do the work called for in the Sever-Williams Company, Inc., bid.

In February, 1962, plaintiff, Board of Education filed suit on the bond to recover for the loss suffered by it as a result of Sever-Williams Company, Inc., failure to honor its bid and the surety's failure to honor its bond on the contract award.[10] Defendants, Sever-Williams Company, Inc., and Federal Insurance Company filed general denials to the allegations of the petition and later filed amended answers and cross-petitions, each defendant claiming a "mistake" as a defense for Sever-Williams Company, Inc., failure to enter into a contract, and for Federal Insurance Company's failure to honor the bid bond submitted with the bid. The matter was tried to a Court and Jury in July, 1966. The prayer of the Board of Education's petition was for the recovery of the loss and damage caused by the defendant's actions on its default on the award and on its bid to the extent of the bond, and for judgment on the bond against Federal Insurance Company who failed to honor its bond.

The evidence showed that the premium for the bid and construction bond as evidenced by the record exceeded $9,247.50.[11]

---

[9] Record, P. 28
[10] Record, P. 1
[11] Defendants Exhibit E, Record P. 67

At the conclusion of the plaintiff's case, defendants moved for a directed verdict. The Common Pleas Court found that the requirements of the bond were absolute and that the Board of Education had proven its case. The defendants at that time admitted that the Board of Education had proven its case. The motion for the directed verdict made by the defendants was overruled.

The defendants, in their amended cross-petitions, claimed grounds for relief in equity based on an alleged "mistake" in the bid. The mistake did not appear on the bid submitted to the Board of Education, or in the amount of the bond. Both were correct, and the totals, the labor and material, being totalled separately were correct.[12] The bid was completely regular as submitted, opened, read and awarded by the Board of Education.

The defendant, Sever-Williams Company, Inc., presented evidence upon its cross-petition asking for relief on the ground of "mistake". The defendant, Federal Insurance Company, offered no evidence of any kind. The mistake claimed was the omission of an item of $145,000.00 which did not appear on the face of the bid or in the tabulation of the bid submitted, or in the amount of the bond. There were no allegations of mutual mistake, nor was any evidence offered in support of one.

The evidence was that the defendant, Sever-Williams Company, Inc., bid was within the estimate of the architect employed by the Board of Education.[13] The final cost to the Board of Education, after the bid was let to Knowlton, Inc. when Sever-Williams Company, Inc. refused to honor its bid, exceeded the Sever-Williams Company, Inc. bid for more than the amount of the bond, ($141,500.00)[13] and necessitated a cut back in the building program.

---

[12] Plaintiff's Exhibit 1, Record P. 45
[13] Record P. 56

The rebuttal evidence offered by the plaintiff, included the testimony by the Clerk of the Reynoldsburg Board of Education, Kenneth L. Black, that Sever-Williams Company, Inc. had made a similar mistake in bidding on a school in Reynoldsburg approximately six (6) months before.[14] This evidence was refused by the Court and was proffered by the plaintiff in a limited form.

The Court found that while the contractor had made a mistake, the public had suffered no loss. No evidence was permitted by the Court as to the amount of the damages that the school district suffered as a result of the cut back or the damages resulting from the diminution of the building program brought about when the defendant, Sever-Williams Company, Inc. failed to honor its bid.

The Common Pleas Court refused evidence on the matter of delay and what effect it might have had on the question of damages if all the bids had been rejected and the matter rebid; holding that such evidence was immaterial.

The Court did find in its opinion that defendant, Sever-Williams Company, Inc. was negligent, which fact, coupled with the damages involved and the nature of the suit entitled plaintiff to recover as per the prayer of its petition.

In its ruling, directing the verdict in favor of the defendants, Sever-Williams Company, Inc. and Federal Insurance Company, the Court ordered recission of the bid of defendant, Sever-Williams Company, Inc. and a cancellation of the bid bond of defendant, Federal Insurance Company, and dismissal of the plaintiff's petition, holding that as a Court of Equity it had the power to relieve the defendant, Sever-Williams Company, Inc. of what might be an impossible financial burden. No evidence was put before the Court as to the ability of Federal Insurance Company

[14] Plaintiff's Exhibit 8

to pay this bond, or what effect it might have on them in the event they were required to do so.

The Court of Appeals considered the alleged mistake as a "mutual mistake", it refused trial de novo and affirmed the judgment of the lower Court. The Court of Common Pleas had found it had the power to relieve the defendant bonding company of its obligation to the Board of Education to make up the loss suffered as a result of the defendant, Sever-Williams Company, Inc. actions.

This dispute was a part of an extensive school construction program being carried on by the Board of Education of the Chillicothe City School District, after feasibility studies, architect's estimates, a determination of necessity by the Board, followed by the adoption of the program, and the voting of the necessary levies for the construction program by the taxpayers of the district based upon the feasibility studies and the architect's estimates, up to the point of advertising and awarding the bids for the construction of the new high school. In all of this procedure, no mistake was made by the Board of Education in its handling of its public duties. The effect of this alleged "mistake" by a bidder could and did disrupt and set back the needed program.

As a result the program was not completed.

The Ohio Supreme Court admitted the case for review on motion to certify and heard the matter on appeal as a matter of great public interest, since the decision would affect building contracts for all Ohio schools. It had previously considered and ruled upon allied problems in this same field.[15]

[13] In a similar case, former Chief Justice Taft of the Ohio Supreme Court in considering the case said:

---

[15] State ex rel Riley Construction Co. v. Board of Education, 10 OS 2d 25

"The procedure here approved would enable a bidder with the co-operation of his surety, to avoid the consequences of his bid after the opening of the bids."[16]

REASONS FOR DENYING THE WRIT

The Ohio Supreme Court, after full consideration of all the issues involved, finding the matter to be a matter of great public interest, has held that the provisions of Ohio Revised Code, Section 3313.46 were within the statutory power of the General Assembly and the regulations reasonably calculated to preserve the integrity of public contracts and the strict performance thereof. The bid bond is required as a part of the conditions of an offer to contract with a Board of Education and is part of the consideration for said offer. The expense of the bid bond and the performance bond are a part of the costs to be paid by the Board of Education to the other contracting party.[17] The bond contract, which is separate from the offer and becomes effective at the time the offer is lawfully opened and accepted, speaks for itself and has no dependence on the effect or terms of any other contract excepting only that by its terms the bond contract ends when the principal makes payment under it or enters into a final performance contract under the terms of its bid. The Court held as a part of its syllabus that the public benefits required by the strict compliance of this section of the Code outweighed any benefits to the principals on a bid bond releasing them from liability because of mistake in the computation of the bid. The Court did not deny the possibility of relief from a mistake of a bidder of a public construction contract. In the concurring opinion of Justice Schneider of the Ohio Supreme Court, this issue was fully considered and the appellees therein, (petitioners herein), were found to have

[16] Supra (15)
[17] Supra (2)

been guilty of laches. This issue was raised in all courts at all levels and was ruled on in each court.

Typical of the comment on recent well considered cases in this field is the following:

> "The general rules of construction that a surety's liability is measured by and strictly limited to the terms of its contract and may not, in the guise of a construing or interpretating the ambiguities, be enlarged beyond the plain terms of stipulations, are applicable to bid bonds for public works, but they may not be blindly applied, ignoring the circumstances under which the construction contract was awarded to the principal, and the bond was executed by the surety and delivered to and accepted by the obligee." (Annotation, Surety's Liability on bid bonds for public works, the annotation herein referred to also refers to Annotation 70 ALR 2d 1370 annotating following the annotation on Bolivar Re-Organized School District No. 1, Polk County, Missouri, Respondent vs. The American Surety Co. of New York, a corporation, Appellant, appearing in 70 ALR 2d 1361)

If petitioners consider Moffett, Hodgkins & Clarke Co. vs. City of Rochester, 178 US 373 (1900) as the leading case on the issues herein proposed, it is distinguishable. In the Moffett case, in the syllabus, the following is set forth:

> "A mistake in the proposal by a bidder for a contract with a city, which is promptly declared by an agent of the bidder as soon as it is discovered and before the city has done anything to alter its condition, will not bind the bidder by reason of the provision of the city charter that a bid shall not be withdrawn or cancelled until the board shall relet the contract." (Syllabus 1, Moffett, Hodgkins & Clarke)

As pointed out in the opinion (Page 385)

> "There was a prompt declaration of mistake as soon as it was discovered and before the city had done anything to alter its condition." (Page 385)
> "The rule between individuals is that until a proposal be accepted it may be withdrawn." (Page 386)

In this case the proposal had been accepted, awarded and the company advised of the award. Ohio did not as petitioners would represent to the court hold that the "proposed firm bid rule" was without equitable exception. Indeed, the court in its syllabus said:

> "Just as bids must be filed by a time certain, and late bids are not considered, so must cancellation or withdrawal of a bid be made before it is opened and the bid bond contract becomes effective. After a bid bond contract becomes effective it may be terminated only in accordance with its own terms." [18]

Thus while the petitioners and Justice Schneider in his concurring opinion indicated that the syllabus overturned the rule followed in Ohio decisions in Toledo vs. Schulters (1896) 11 CC 528 and Ferro Concrete Const. Co. vs. Board of Education of Cincinnati (1911), 11 NP (NS) 86. The Court did not so hold in the syllabus.[19] In the Ferro case, Judge Swing granted relief to a bidder who filed a bill in equity asking to be relieved of his erroneous bid prior to the opening of the bids. The Court granted his prayer and enjoined the Board of Education of Cincinnati from awarding a contract on the erroneous bid. One of the points considered by the Ohio Supreme Court in this action and commented upon by Justice Schneider is that not only did the petitioners not seek relief in a court of equity at the time of the discovery of the mistake, but they made no effort to do so until long after the occurrence, and after the Board had sought relief under the bond.

Section 3313.46, Revised Code, prescribing procedures for awarding school construction contracts is mandatory

[18] Syllabus, 22 OS 2d 107, Appendix (III)

[19] Rule VI, Rules of the Supreme Court of Ohio

Note: In Ohio the Supreme Court speaks through its syllabus, which is the law of the case. (Cassidy v. Glossip, 12 O 2d 17, 41 OO 2d 158, 231 NE 2d 64)

upon school boards.[20] In response to the claim that no consideration, administrative or judicial, was given the alleged mistake, the respondent refers to plaintiff's exhibit 6, the minutes of the meeting of June for June 21st, 1961. The telegram from Sever-Williams was received that day, after the award of the contract, offering to show the bid sheets showing the mistake. On June 27th, 1961, Mr. Ray Jenkins appeared before the Board of Education of the Chillicothe City School District and the only thing presented by Mr. Jenkins was a certified copy of a resolution refusing to enter into the bid. The board had refrained from action to give an opportunity to be relieved from its statutory duty by a court. Since the bid was regular on its face, contained no mistakes, or omissions, was separated, and accompanied by a proper bid bond, properly executed, in the proper amount, the Board was bound by its award.

There were three (3) states which were brought to respondent's attention, who in similar circumstances, hold the surety company liable when the principal fails to enter into a contract and to provide a performance bond. These three (3) states (California,[21] Missouri,[22] Pennsylvania[23]) all were faced with similar situations and comparable statutes regarding the provision of a bid bond accompanying the public bid. The Missouri case held the defendant liable upon its bond, since, by its simplest terms it insured the entry upon the contract and the performance thereof which principal failed to do.

---

[20] H. R. Johnson Construction Co. v. Board of Education of Painesville Township Local School District (16 Ohio Misc. 99) (1968)

[21] Elsinore Union Elementary School District vs. Kastorff, 346 Pac. 850

[22] Bolivar Re-Organized School District vs. American Surety Company, 307 SW 2d 405, Anno. 70 ALR 2d 1361

[23] Colella v. Allegheny County (391 Pa. 103, 137 Atl 2d 265), Heddon v. North Hampton Area Joint School Suthority (1959) 396 Pa. 329, 152 Atl. 2d 463

The Pennsylvania case went further and found on the grounds of public policy the fact that a contractor made a clerical mistake in submitting its bid would not entitle it to return of the bond after the bids were opened and before the contract was awarded to the contractor, on the grounds that it would be contrary to public interest and open the door to fraud and collusion.[24] The petitioners, in their claims before the Ross County Common Pleas Court cited the Ferro Const. Co. case.[25] In that case, as in the Moffett case,[26] the bidder sought timely relief in equity and was granted the relief. In both instances it was "before the opening of the bids". In the statement quoted from 52 ALR 792 (at page 796) which respondent cited in its trial brief to the Ross County Common Pleas Court, the situation is conditioned on notice communicated before a material change in position and before acceptance of the bid.[27] The law is fairly well established as follows:

> "If a bidder who makes an unilateral mistake, even upon the assumption that it is remedial, fails to establish ordinary diligence in detecting or asserting it, to the damage or prejudice of the offeree, he is not entitled to recover a deposit or cancel a security required to accompany the bid for the purpose of assuring the execution of a contract upon award to him."[28]

The letting of public bids by school boards is closely tied in with the financing of improvements for upon which these bids are made. These improvements are limited by the amount of funds available which makes their operation

[24] Note 23 Supra
[25] Ferro Concrete Construction Company v. Board of Education (1911) 11 ONP (NS) 86
[26] Moffett, Hodgkins & Clarke Co. vs. City of Rochester (1900) 178 US 373
[27] 52 ALR 2d 796
[28] 52 ALR 2d 812

quite different than that of the Federal Government or of the State authorities whose budgeting processes are different. The Chillicothe City Board of Education had the experience in two prior occasions of having improvement programs fail their goal because of the shortage of funds and increased prices. Testimony was proffered in the lower court, and again proffered in the Court of Appeals by a member of the Board of Education, William Ringwald, a contractor, as to the price change which could have been suffered by the Board.[29]

Not only did the parties to this action have administrative consideration by the Board of Education, which delayed any action until the Vice-President of the firm appeared before them to present their resolution refusing to enter into the contract. Their claim on bid and bond was given judicial consideration by the Common Pleas Court, the Court of Appeals and the Supreme Court of Ohio. The evidence refused by the Common Pleas Court was admitted by the Court of Appeals upon trial de novo and considered by the Supreme Court. The Court of Appeals, affirming the judgment, found the Court had ruled upon a point of law in directing the verdict.

The action of the Reynoldsburg Board of Education refers to a cancellation and rejection of all bids, which action was taken by the Reynoldsburg Board of Education as a result of similar error in bid computation by Sever-Williams in September, 1960. Respondent herein proposed at that time to produce evidence as to the additional cost to the Reynoldsburg program brought about by the delay caused when all bids were rejected and the project was readvertised but the lower court rejected it and the evidence

[29] Record P. 44

concerning the action of the board was proffered.[30] This was the hard choice faced by the Board of Education, who determined to proceed and get as much of the project done as possible with the funds available.

Respondent submits that based upon the arguments proposed by the petitioners and upon consideration of the case as a whole, the Ohio statutory bid requirements do not prohibit the possibility of relief either administrative or judicial where timely application is made on notice given of an alleged mistake in a bid. The action by the petitioner, Sever-Williams Company, Inc., if allowed to stand, would make it possible for bidders, by asserting a "mistake" to invalidate every bid proceeding they chose to invalidate, thereby reducing the procedures established by the Ohio General Assembly to a shambles and making the construction of additional school buildings within the limitation of the tax levies voted for them, impossible. The bond requirement would be reduced to a nullity.

No substantive procedural due process was denied the petitioners and there has been no forfeiture. This is not new law in Ohio. The statute is one of long standing, having been enacted in a similar wording as early as 1873. The bond requirement has been a part of the condition with a minimum placed in the statute (5%). The Board over the years provided that a ten per cent (10%) bond be required.

The irrationality of the notation carried by petitioner as a footnote on page 16 concerning the courts interpretation of the applicability of the Moffett case can be best pointed out as the "shrewd Ohio school board" is required to have an architect certify to it a proposed cost of the building in question. This was done in this case and the Sever-

[30] Plaintiff's Exhibit 8. Note: The Reynoldsburg Board, after permitting withdrawal of the Sever-Williams bid, which was without error on its face, then rejected all bids and re-advertised.

Williams bid was within the architects estimate. It is the Ohio statutes regarding the Department of Public Highways and the Department of Public Works giving the contracting authorities the right of review of bids that are substantially higher or lower than the estimates for the work because of the varied interpretations of the specifications involved. This condition does not exist where there is architectural supervision of the construction by the same architect drawing the specifications for bidding. The same courts were available to the petitioners at the time of the discovery of the alleged mistake. Their amended answer and cross-petition requesting equitable relief was filed in October, 1963.

Not only did the petitioners have notice of what the Board had to do, they had already contacted their counsel [31] and were present at the meeting of June 27, 1961, at which meeting the action was taken.[32] At no time were the petitioners herein denied the opportunity to be heard, nor would they be under this case or under the new Ohio rules which were adopted July 1, 1970. The petitioners misconstrue the action of the Ohio court in dismissing the cross-petitions in equity. These were heard and fully considered and defendants moved for judgment upon their cross-petitions. It was the error in granting this judgment that the Supreme Court reversed because the verdict at that time should have been directed for the plaintiff upon its petition and against the defendants in their action in equity. The petitioners do not consider that the factual finding of a "bona fide" mistake, was made in the lower courts without considering the evidence proffered by the plaintiff with regard to petitioners actions. Ohio contracting agencies are in no different position than they were before the advent

[31] Record P. 137
[32] Plaintiff's Exhibit 6

of this suit as a result of the Supreme Court decision. Since the decision in this case, plaintiff, respondent herein, endeavored to complete the judicial process begun in February of 1962 by carrying out the mandate of the Court upon receipt of the record from the Ohio Supreme Court. The condition of the bond requires the payment of the difference between the price bid and the amount paid. The evidence of the difference is now uncontrovertable since the building is completed, the cutback in the program appears as a matter of record ($91,000.00) showing the damages suffered by the school district to be in excess of the amount of the bid bond. Plaintiff is entitled to judgment, upon whatever damages are determined to be due under the bid bond. This is the mandate of the Ohio Supreme Court.

No evidence has been received concerning the net worth of The Federal Insurance Company. While some of it was discussed, no certified balance sheets or statements of net worth were proffered as evidence in any of these causes by the petitioners. The consideration binding upon the Board of Education was that the Sever-Williams Company, Inc. was "the lowest responsible bidder". Based upon their past reputation of work done for the Chillicothe City Board of Education, they were acknowledged to be responsible, and were undoubtedly the lowest responsible bidder in the bid letting of June 20th, 1961. The Board had no choice but to award them the contract upon completely regular bid, and there is nothing unconstitutional about the operation of the bid bond statute under the decision of the Ohio Supreme Court in this cause.

The application for writ of certiorari should be denied.

This case has been fully litigated in the state court, fully considered by the Ohio Supreme Court. Under the terms of the mandate of the Ohio Supreme Court, defendants,

petitioners herein, are not estopped from presenting evidence in mitigation for claimed damages proposed by the plaintiff, respondent herein, and the judgment may be appealed by either party. To that extent the cause is not complete. Certiorari should be denied.

Respectfully submitted,

WILLIAM W. STANHOPE
PHIL D. BUTLER
Counsel for the Respondent

1970 *TERM*

To wit: May 6, 1970

No. 68-670

THE STATE OF OHIO,
City of Columbus.

THE BOARD OF EDUCATION OF THE
CHILLICOTHE CITY SCHOOL DISTRICT,
Plaintiff-Appellant,

vs.

SEVER-WILLIAMS COMPANY, INC., ET AL.,
Defendants-Appellees.

MANDATE

To the Honorable COMMON PLEAS COURT
Within and for the County of ROSS, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals is reversed and this court enters final judgment in favor of the plaintiff and against the defendants on defendants' cross-petition; and the judgment of the Court of Appeals in favor of defendants on plaintiff's petition is reversed, and the cause remanded to the Common Pleas Court for trial on the issue of damages under the terms of the bond, for the reasons set forth in the opinion rendered herein.

THOMAS L. STARTZMAN
Clerk

..... 19.....

.....

..... *Deputy*

RECORD OF COSTS

Docket Fee	$ 20.00	*Paid by* WILLIAM W. STANHOPE
Docket Fee	$	*Paid by* . . . . .
Docket Fee	$	*Paid by* . . . . .
Printing Record . . .	$1,406.21	*Paid by* WILLIAM W. STANHOPE
Supplemental Record	$ 644.80	*Paid by* JOHN PETRO . . . . .
Sheriff's Costs . . .	$	*Paid by* . . . . .
Sheriff's Costs . . .	$	*Paid by* . . . . .

OHIO REVISED CODE

§ 3313.46. Procedure for bidding and letting of contracts.

When the board of education determines to build, repair, enlarge, or furnish a schoolhouse, or make any improvements or repairs, the cost of which will exceed in city districts, six thousand dollars, and in other districts four thousand dollars, except in cases of urgent necessity, or for the security and protection of school property, it must proceed as follows:

(A) For the period of four weeks, the board shall advertise for bids in some newspaper of general circulation in the district and two such papers, if there are two. If no newspaper has a general circulation in the district, then the board shall post such advertisement in three public places in the district. Such advertisement shall be entered in full by the clerk of the board of education, on the record of proceedings of the board.

(B) The sealed bids must be filed with the clerk by twelve noon of the last day stated in the advertisement.

(C) The bids shall be opened at the next meeting of the board, be publicly read by the clerk, and entered in full on the records of the board; provided that the board may by resolution provide for the public opening and reading of such bids by the clerk immediately after the time for filing

such bids has expired, at the usual place of meeting of the board, and for the tabulation of such bids and a report thereof to the board at its next meeting.

(D) Each bid must contain the name of every person interested therein, and shall be accompanied by a bid bond or by a certified check upon a solvent bank, as the board requires, payable to the order of the treasurer of the board of education, in an amount to be fixed by the board or by an officer designated for such purpose by the board, said bond or check to be in no case less than five per cent of the amount of the bid and conditioned that if the bid is accepted, a contract will be entered into, and the performance of it properly secured.

(E) When both labor and materials are embraced in the work bid for, the board may require that each be separately stated in the bid, with the price thereof, or may require that bids be submitted without such separation.

(F) None but the lowest responsible bid shall be accepted. The board may reject all the bids, or accept any bid for both labor and material for such improvement or repair, which is the lowest in the aggregate.

(G) The contract must be between the board and the bidders. The board shall pay the contract price for the work at the times and in the amounts provided by sections 3313.461 (3313.46.1) and 3313.462 (3313.46.2) of the Revised Code.

(H) When two or more bids are equal, in the whole, or in any part thereof, and are lower than any others, either may be accepted, but in no case shall the work be divided between such bidders.

(I) When there is reason to believe there is collusion or combination among the bidders, or any number of them, the bids of those concerned therein shall be rejected.

OHIO SUPREME COURT
22 Ohio State Report 107, Ohio Bar
May 11, 1970

Board of Edn. of Chillicothe City School District
Appellant, v. Sever-Williams Co., Inc., et al., Appellees.
[Cite as Bd. of Edn. v. Sever-Williams Co. (1970),
22 Ohio St. 2d 107.]

Public contracts—Procedure for letting bids—Statutory requirements to be complied with—Bid for construction of school building—Bid bond required—A separate contract—Becomes effective and terminates, when—Strict compliance with R. C. 3313.46 required—Bid bond contract terminated in accordance with its terms.

1. It is within the statutory power of the General Assembly to lay down rules governing the procedure for the letting of public contracts, and where a validly enacted statute sets forth requirements governing the letting of public contracts which are reasonably calculated to preserve the integrity of public contracts and to secure performance thereunder, the parties must comply with those requirements.

2. R. C. 3313.46 requires the submission of a bid bond with an offer to contract with a board of education for the erection of a school building, as a condition of consideration of the offer. The bond contract, which is separate from the offer and becomes effective at the time the offer is lawfully opened and accepted, speaks for itself and has no implied dependence on the effect or terms of any other contract, excepting only that by its terms the bond contract ends when the principal makes payment under it or enters into a final performance contract under the terms of its bid. Otherwise the bid bond remains in full force and effect.

3. The possible abuse of amending or changing bids after a formal opening of sealed bids, or of favoring one bidder

over another, endangers the sanctity of sealed bids. The public benefit resulting from a strict compliance with the requirements of R.S. 3313.46 outweighs any benefits to the principals on a bid bond releasing them from liability because of a mistake in the computation of the bid.

4. Just as bids must be filed by a time certain, and late bids are not considered, so must cancellation or withdrawal of a bid be made before it is opened and the bid bond contract becomes effective. After a bid bond contract becomes effective, it may be terminated only in accordance with its own terms.

JANUARY TERM, 1970

Statement of the Case
(22 Ohio St. 2d)

(No. 68-670—Decided May 6, 1970)

Appeal from the Court of Appeals for Ross County

This action was instituted by the Board of Education of the Chillicothe City School District against Sever-Williams Co., Inc. and the Federal Insurance Company. In its petition, plaintiff alleges that it adopted a resolution approving and accepting the plans, specifications and estimates for a new high school, with direction to its clerk to advertise for bids in a newspaper of general circulation for a period of not less than four (4) weeks; that the advertisement appeared in an accredited newspaper and directed that sealed proposals be filed by bidders on or before June 20, 1961, at 12:00 o'clock, noon, Eastern Standard Time.

It is alleged further that Sever-Williams submitted a bid in compliance with the terms and conditions of the legal notice, in the amount of $1,242,000 together with a bid bond in the sum of $137,000, in which the plaintiff, the board of education, is the obligee, Sever-Williams is the principal, and Federal Insurance is the surety.

It is alleged also that the board of education accepted the bid of Sever-Williams, and awarded that company a contract for the construction of the high school "but the said defendant***failed and refused to enter into a contract*** under the terms and conditions of the said bid***and refused to give the plaintiff a bond of good and sufficient surety for the faithful performance of such contract. Thereafter, on the next day, June 21st, 1961, the defendant Sever-Williams notified the plaintiff that it was withdrawing its bid and would decline to enter into said contract or to furnish and execute said (performance) bond.

> "***thereafter, on June 26th, 1961, the said defendant***again refused to enter into said contract and to furnish said bond and by telegram, withdrew its bid, and as a result thereof, it was necessary for the plaintiff to award the contract to the next low bidder, and that the difference between the amount specified in said bid of Sever-Williams Company, Inc., as secured by the bid bond of the Federal Insurance Company, and the amount for which the obligee legally contracted with another party to perform the work covered by the bid, amounted to $141,500."

The petition concludes with a prayer for judgment in the amount of $137,000, plus costs and interest claimed to be owing "as a result of the damages suffered by the plaintiff to the extent that they are covered by the bond submitted with the bid"

In answer to the petition, Sever-Williams admits its refusal to enter into a contract pursuant to its bid, because, through inadvertence, oversight and mistake, an item of $145,000 had been omitted from the bid. In a cross petition, in which the prayer was "That the erroneous bid and the bid bond" be ordered cancelled, Sever-Williams alleged that after the bids were opened it "learned that the base

bids submitted by Sever-Williams was substantially lower than other base bids submitted"; that upon re-examination of its bid calculations it discovered that through inadvertence and oversight an item of $145,000 had not been included in the base bid submitted; that "at the time of the opening of the bids and prior to acceptance of any bid by the board of education, the board of education had notice that the base bid of Sever-Williams contained a mistake and that Sever-Williams would not enter into a contract with the board of education pursuant to the base bid of $1,242,000; that "the cost to perform the work included in the base bid submitted by Sever-Williams would have exceeded the amount of the base bid submitted by Sever-Williams, namely, $1,242,000. The performance of the work by Sever-Williams pursuant to the base bid submitted would have resulted in a loss to Sever-Williams. On or about June 27, 1961, the board of education entered into a contract with Knowlton, Inc., for the construction of Chillicothe Senior High School without additional cost to the board of Education."

The answer and cross-petition filed by the defendant Federal Insurance Company was in substance, the same as the pleadings of Sever-Williams.

At the conclusion of the evidence, the Court of Common Pleas granted defendants' motion for a directed verdict and dismissed the petition. It likewise granted the prayer of the amended cross-petition by rescinding the bid and bid bond of the defendants.

Upon appeal, the Court of Appeals affirmed the judgment entered upon the directed verdict and entered its judgment on the defendants' amended cross-petitions by rescinding and cancelling the bid and bid bond submitted on June 20, 1961, by Sever-Williams (16 Ohio App. 2d 7).

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Mr. William W. Stanhope and Mr. Phil D. Butler, for appellant.

Messrs. McNamara & McNamara, Mr. John J. Petro & Mr. Charles S. Hire for (appellees).

Doyle, J. In compliance with statutory requirements (R.C. 3313.46) the Board of Education of the Chillicothe City School District invited bids for the construction of a high school. It advertised the fact in a newspaper of general circulation for a period of four weeks; it instructed that sealed proposals for the construction of the building in accordance with the plans and specifications on file would be received by the Clerk of the Board of Education for the board at its office "until 12 o'clock noon, Eastern Standard Time on Tuesday, June 20, 1961, and (bids) will be opened and read aloud immediately thereafter"; it stated that each bid must be accompanied by a surety company bond or certified check in an amount equal to ten per cent of the bid "as a guarantee that if the bid is accepted, a contract will be entered into in accordance with the drawings and specifications and general conditions of the contract and bond form on file***." The publication further directed that "no bidder may withdraw his bid for a period of thirty days after the opening thereof."

The board of education met on June 20, 1961, and at an open meeting the three bids which had been submitted before the so-called dead line were opened and read. Sever-Williams was found to have submitted the lowest bid and was found by the board to satisfy the statutory requirement of being the "lowest responsible" bidder and was rewarded the bid at the meeting immediately following.

When the bids were opened and read, a Mr. Puckett, vice-

president and representative of Sever-Williams, observed a substantial difference between his company's bid and the bids of the two other bidders. He thereupon contacted the office of his company, and, upon examination of the items of his company's bid, discovered the omission of an item totaling $145,000. He informally discussed the question of error with a representative of the firm of architects employed by the board of education, but did not discuss the matter with the board.

As heretofore stated, the bid was accepted by the board on June 20, 1961, shortly after the bids were opened. On June 21, 1961, a contract was awarded to Sever-Williams as the lowest responsible bidder. After the award of the contract a telegram was received by the board, from Sever-Williams, reading, in part, as follows:

> "This will confirm our notice given to you yesterday that there was a mistake in our bid. We hereby withdraw our bid and request that our bid be disregarded in determination of the low bid and in the award of the contract."

The reference in the telegram to a confirmation of "notice given to you yesterday" obviously refers to Mr. Puckett's discussion of the error with an agent of the firm of architects and several school board members. On June 26, 1961, another telegram was sent by Sever-Williams to the board of education. It reads, in pertinent part:

> "We have received a copy of your resolution and this is to inform you that we will not execute a contract on our bid submitted June 20, 1961, which contained a mistake in amount of $145,000. We will take any legal action necessary to protect our rights."

A formal resolution of Sever-Williams was then presented to the board of education stating that it would not enter into a contract based upon its bid of June 20, 1961.

It is within the statutory power of the General Assembly to lay down rules governing the procedure for the letting

of public contracts, and where a validly enacted statute sets forth requirements governing the letting of public contracts which are reasonably calculated to preserve the integrity of such contracts and to secure performance thereunder, the parties must comply with those requirements.

In R.C. 3313.46, the General Assembly has directed the method by which a building contractor may secure a contract with a board of education. It requires that contracts be awarded only after the opening of sealed bids, which must be accompanied by a bond conditioned that if the bid is accepted a contract will be entered into and the performance of it properly secured.

It thus appears that, in the letting of public contracts, the Ohio Code requires that two bonds be given. First, the bid bond, which must be filed with the bid. Then, if a contract is awarded the bidder, a performance bond is required in connection with the execution of the formal contract for the performance of the work

In the instant case, the bid bond, upon which this suit is predicated, was presented with the bid for the work in the amount of $137,000, and the bid for the work was in the sum of $1,242,000 plus alternatives. The amount of the bond was well within the provisions of R.C. 3313.46, which, in pertinent part, reads:

> "***said bond***to be in no case less than five per cent of the amount of the bid and conditioned that if the bid is accepted, a contract will be entered into, and the performance of it properly secured."

It is claimed by the defendant contractor that, "where a bidder on a public construction contract through an inadvertent clerical error, omits an item from the bid submitted, the bidder is entitled to the rescission of the bid and bid bond if the bidder can establish that (1) the mistake was material; (2) the enforcement of a contract pursuant to the terms of the erroneous bid would be unconscionable; (3)

the mistake did not result from a violation of a positive legal duty or from gross negligence; (4) there is no prejudice to the public authority except the loss of the bargain; and (5) prompt notice of the error is given."

The above grounds for rescission find support in some cases in other states. In this state, however, no case involving similar facts has been heretofore decided.

It is obvious that this action is brought by the board of education for recovery in the amount of the bid bond executed by Sever-Williams and Federal Insurance. The amount asked is the amount specified in the bond ($137,000), not compensation for the extra cost of the work, which appears to be in the sum of $141,500; nor is the suit for specific performance of the contract.

In simple terms, the bid bond contract, by its very terms, went into full force and effect when the bid was accepted by the board of education. Also, by its very terms, the obligations contained therein could be terminated only if Sever-Williams entered into a construction contract and furnished another bond (performance bond) as required by statute, or, in the event of the contractor's refusal to enter into a contract and give a performance bond, to pay to the board of education the difference, not to exceed the "penalty" in the amount of $137,000, between the amount specified in the bid for the work and the amount for which the board of education may legally contract with another party to perform the work covered by the bid.

There are no conditions in the bond itself, nor in the advertisement for bids, that any mistake in the office of the bidder, prior to the making of the bid, may operate as a cancellation of any of the provisions of the bid bond contract. When Sever-Williams made its bid, it said exactly what it then intended to say, and it conveyed to the board of education, when the bid was opened and accepted, ex-

actly the meaning that it intended to convey. Here, we have exact agreement in intention as well as in expression. The mistake was one of computation wholly antecedent to the expressed intention and communicated offer. These circumstances create a valid contract, enforceable against the bidder.

This is the contract the statutory bond guaranteed and which committed Federal Insurance to the obligations specifically set forth therein in the event of a failure of its principal to enter into a further contract and give a performance bond.

The question here presented, does not concern a construction contract, for it does not involve resulting damages or specific performance. This case is based on the bid bond contract and, while it is related to a construction contract, it is entirely separate therefrom and must be examined from the four corners of the bid bond contract. Such contract is consideration for the board of education to open and consider the bid, toward a possible award of a construction contract. The board of education completed this consideration.

In summary, this accepted contract contained in the bid bond says:

> "If the obligee (board of education) shall accept the bid of the principal (Sever-Williams Company) and the principal shall enter into a contract with the obligee (board of education) in accordance with such bid and give a bond with good and sufficient surety for the faithful performance of such contract, or in the event of the failure of the principal to enter into such contract and give such bond, if the principal shall pay to the obligee the difference, not to exceed the penalty thereof, between the amount specified in said bid and the amount for which the obligee may legally contract with another party to perform the work covered by said bid, if the latter amount be in excess of the former, then this obligation shall be null and void, otherwise to remain in full force and effect." (emphasis added.)

Certainly the General Assembly did not intend that the required bid bond should be a meaningless contract when accepted. Obviously its purpose is to compel the bidder to enter into a contract if his bid is accepted, or to compensate the public body, at least to some extent, for losses incurred if the bidder defaults.

A decision to hold a negligent bidder liable on his contract, where he has actually made a mistake in the preparation of his bid, may seem a hardship, but if the statute is to have any effect that must be the result. The statute is an essential part of the bidder's proposal and he makes all of its terms and conditions an obligation upon himself when he submits a bid. When the General Assembly enacted R.C. 3313.46, it created no exceptions for situations such as are here presented. In fact, it specifically provided the penalty as indicated above, "in the event of the failure of the principal to enter into such contract and give such (performance) bond." Cf. Colella v. Allegheny County, 391 pa. 103, 137 A 2d 265.

The legislative intent which prompted the passage of R.C. 3313.46 was obviously to provide for open and honest competition in bidding for public contracts and to save the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms. The statute must be enforced and relief in equity denied.

Therefore, the judgment of the Court of Appeals is reversed and this court enters final judgment in favor of the plaintiff and against the defendants on defendants' cross-petition; and the judgment of the Court of Appeals in favor of defendants on plaintiff's petition is reversed, and the cause is ramanded to the Common Pleas Court for trial on the issue of damages under the terms of the bond.

Judgment accordingly.

O'Neill, C. J., Herbert, Duncan and Corrigan, J. J., concur.*

Schneider, J., concurs in the judgment. The bids were opened on June 20, 1961, but appellee did not promptly seek relief from the mistake resulting from its own negligence. It was thus barred by laches from asserting its claim for rescission when appellant finally brought this action to protect itself as late as Feb. 1962, after appellant had awarded a new contract to the next highest bidder.

However, I do not concur in the syllabus which overturns a long-standing rule followed in many political subdivisions in Ohio as expressed by Toledo v. Schulters (1896), 11 C.C. 528, and Ferro Concrete Construction Co. V. Board of Education of Cincinnati (1911), 11 N.P. (N.S.) 86.

Doyle, J., of the Ninth Appellate District, sitting for Matthias, J.

* Chief Justice Taft participated in this case which was, however, decided after his death.

Supreme Court, U.S.
FILED
DEC 18 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 613

THE BOARD OF PUBLIC INSTRUCTION OF PINELLAS COUNTY, FLORIDA, *et al.*,

Petitioners,

v.

LEON W. BRADLEY, JR., *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
DREW S. DAYS, III
10 Columbus Circle
New York, New York 10019

JAMES B. SANDERLIN
1407 22nd Street South
St. Petersburg, Florida 33712

Attorneys for Respondents

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement	2
ARGUMENT	4
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

Andrews v. City of Monroe, 425 F.2d 1017 (5th Cir. 1970)	5
Brown v. Board of Education, 347 U.S. 483 (1954)	2, 4, 5
Charlotte-Mecklenburg Bd. of Ed. v. Swann, 431 F.2d 138 (4th Cir. 1970)	5, 7
Davis v. Board of School Comm'rs of Mobile County No. 436, O.T. 1970	3, 4, 5, 7
Green v. County School Board, 391 U.S. 430 (1968)	2, 3, 6
McDaniel v. Barresi, Oct. Term, 1970, No. 420	4, 6
Monroe v. Board of Comm'rs of Jackson, 427 F.2d 1005 (6th Cir. 1970)	5